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No. 98-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,

Petitioner,

vs.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

J. PORTIS HICKS
Counsel of Record
FREDERICK A. BRODIE
TAKEMI UENO
WINTHROP, STIMSON, PUTNAM
& ROBERTS
Attorneys for Respondents
One Battery Park Plaza
New York, New York 10004-1490
(212) 858-1000

40 pp

QUESTIONS PRESENTED

1. Whether this Court should resolve a narrow and decreasing difference among the circuits regarding a non-exclusive test for subject matter jurisdiction in international securities fraud cases, even though the application of that test requires a fact-intensive inquiry and substantial alternative grounds exist for affirming the judgment below.

2. Whether this Court should review a determination that the district court lacked subject matter jurisdiction over a securities registration claim brought under sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77*e* and 77*l* (1998), where the lower court's ruling was restricted to the specific facts presented, the lower court did not purport to lay down a rule of general application, no other circuit has spoken on this issue, the ruling below did not conflict with this Court's decisions on the deference due to administrative agencies, and substantial alternative grounds exist for affirming the judgment below.

RULE 29.6 STATEMENT

Respondents respectfully refer the Court to the Rule 29.6 Statement set forth in their conditional cross-petition for writ of certiorari filed on December 4, 1998 (No. 98-923).

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Respondents Paribas (sued herein as Banque Paribas London), Paribas Global Bond Futures Fund (the "Fund"), Paribas Asset Management Ltd. ("PAM"), and John Arida respectfully submit this Brief in opposition to the Petition filed by Europe and Overseas Commodity Traders, S.A. ("EOC" or "Petitioner") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

STATEMENT OF THE CASE [2]

In October 1992, EOC entered into a non-discretionary investment agreement (the "Investment Agreement") with the London branch office of Paribas and opened an investment account with Paribas (the "London Investment Account"). P. App. 2a, 5a; Cross-P. App. 1a-39a. EOC is an alien corporation. The Investment Agreement, executed over a year before the investments at issue were made, states that EOC's country of incorporation is Panama and that its place of corporate registration is in Panama. P. App. 5a; Cross-P. App. 35a. EOC's address for correspondence, its principal place of business, the place where its directors' meetings are held, and the place where its shareholders' meetings are held, are all located in the Principality of Monaco. P. App. 5a, 32a & n.3; Cross-P. App. 35a, 37a. The Investment Agreement was executed on behalf of EOC by EOC directors Ian F. Ledger and Herbert W. Marvelly (P. App. 5a), residents of Monaco.

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1. EOC's Petition for a Writ of Certiorari will be cited as "Pet." The Appendix to EOC's Petition will be cited as "P. App." and the Appendix to Respondents' Conditional Cross-Petition for a Writ of Certiorari will be cited as "Cross-P. App." Emphasis in passages quoted herein is ours unless otherwise indicated.

2. Further details of the case may be found in section I of the Second Circuit's June 4, 1998 opinion (P. App. 4a-8a) and the "Background" section of the district court's June 28, 1996 opinion (P. App. 31a-36a).

The Investment Agreement states:

> This Agreement is governed by English Law. Disputes arising out of this Agreement shall be subject to the jurisdiction of the English courts to which for [Paribas'] benefit [EOC] submit[s].

Cross-P. App. 22a. In the Investment Agreement, EOC named an agent for service of process in England. P. App. 5a; Cross-P. App. 38a.

In October 1993, EOC began purchasing units of the Fund, a Luxembourg entity. P. App. 5a, 32a. The Fund's units are not traded on any U.S. exchange. P. App. 21a. EOC made its initial purchase of Fund units from its London Investment Account after a discussion in England between Alan Carr (a Canadian citizen who owns EOC's shares) and Mr. Arida (a U.K. national employed by Paribas in its London office). Pet. 3-5; P. App. 2a, 33a-35a, 41a.

EOC made later purchases from its London Investment Account, pursuant to directions given by Mr. Carr while Mr. Carr was visiting Florida. P. App. 7a, 20a n.12, 41a-42a.[3] Petitioner's contention that it was induced to make purchases of securities "from Florida" (Pet. 5) is incorrect: as the district court recognized, "each time . . . the actual purchase was made

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3. Petitioner suggests that "a buyer in the United States" was "target[ed]." Pet. 3. However, the buyer — EOC, a Panamanian corporation with a principal place of business in Monaco — was not "in the United States." *Cf.* P. App. 17a n.8 (Oakes, J., noted that "[h]aving chosen to do business through an offshore corporation to avoid taxes and other regulatory burdens, Carr cannot now claim to be an alter ego of EOC"). In addition, EOC was first identified as a customer in England, where Mr. Arida first spoke to Mr. Carr about the Fund. P. App. 33a, 35a.

in London, as the funds used to pay for the shares were debited from plaintiff's trading account with Paribas." P. App. 41a-42a. During a six-week period from October through November 1993, EOC used funds from its London Investment Account to purchase approximately $1,788,800 worth of Fund units. Pet. 5; P. App. 33a, 36a, 39a, 41a-42a, 51a.[4]

While in Florida, Mr. Carr told one of his acquaintances, Matthew O'Brien, about the Fund. P. App. 7a. Petitioner's claim that "*respondents solicited* and sold securities to Mr. O'Brien" (Pet. 6) is thus incorrect. Mr. O'Brien did not submit any evidence below; the information relied upon by EOC is hearsay from Mr. Carr's affidavit. P. App. 7a. Paribas submitted Mr. O'Brien's written application to purchase Fund units, in which Mr. O'Brien stated that he was a British national with a London address and telephone number. P. App. 7a-8a.

After the Fund's units decreased in value, EOC sued Paribas, the Fund, Mr. Arida individually, and PAM (a Bahamian corporation that manages the Fund, P. App. 2a) in the Southern District of New York, asserting claims under the federal securities laws, Florida Blue Sky laws, and Florida common law. Respondents moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over the Fund, Mr. Arida and PAM, and *forum non conveniens*.[5]

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4. Petitioner implies that Mr. Arida initiated all the contacts with Mr. Carr while Mr. Carr was in Florida (Pet. 5). That is not correct: some of the contacts were initiated by Mr. Carr. *See* P. App. 5a ("The parties agree that each party initiated at least some of these calls."). Furthermore, as the district court found, the first order for units of the Fund in response to Respondents' alleged misrepresentations occurred while Mr. Carr was in England, not the United States. P. App. 35a ("Plaintiff's initial purchase of shares in the Fund was made in England on October 8, 1993.").

5. The district court directed Respondents not to move for dismissal under Federal Rule of Civil Procedure 12(b)(6). *See* P. App. 3a. Thus, (Cont'd)

The district court dismissed EOC's complaint in a decision issued June 19, 1996 and amended in minor respects on June 28, 1996. Pet. App. 30a-31a. The district court held that (i) it lacked subject matter jurisdiction of plaintiff's securities law claims; (ii) it lacked personal jurisdiction over the Fund, PAM, and Mr. Arida; and (iii) even if jurisdiction were present, the complaint should be dismissed based on *forum non conveniens*. P. App. 37a-53a.

The United States Court of Appeals for the Second Circuit unanimously affirmed the district court on June 4, 1998, holding that the district court had properly found that it lacked subject matter jurisdiction. Pet. App. 29a. The court of appeals did not reach the *forum non conveniens* issue.

SUMMARY OF ARGUMENT

A writ of certiorari should not be granted.

First, this case involves a rare fact pattern — one that is unlikely to recur. The parties' dispute is of no significance to the public at large.

Second, the difference among the circuits regarding application of the test for subject matter jurisdiction in international securities fraud cases is narrow and appears to be decreasing. The accepted standards all involve a fact-intensive inquiry. Here, the facts would not support a finding of subject matter jurisdiction even if this Court were to adopt the allegedly more liberal standards for jurisdiction in the Third, Eighth, and Ninth Circuits.

(Cont'd)
whether the complaint states a claim has not yet been tested and is not in issue.

Third, this is the first case to decide the standard for subject matter jurisdiction under section 12 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77*l*, over registration claims arising from foreign transactions. There is no conflict among the circuits on this issue of first impression. Further, the Second Circuit's analysis of Regulation S, 17 C.F.R. §§ 230.901-230.904 (1998), was dictum. The court of appeals expressly stated that it was not "attempt[ing] . . . to provide a set of definitive rules to govern future transactions." P. App. 18a.

Fourth, the Second Circuit's decision does not conflict with this Court's rulings on the deference due to administrative agencies.

Fifth, the questions on which Petitioner seeks review are academic: even if this Court resolved both issues in Petitioner's favor, the complaint would still be dismissable based on *forum non conveniens* and other grounds.

Finally, the district court's decision and its unanimous affirmance by the Second Circuit were both substantively correct.

REASONS FOR DENYING THE WRIT

I.

THE FACTS IN THIS CASE ARE UNLIKELY TO RECUR

This case does not merit review by this Court because the fact pattern involved is unlikely to recur. This case involved the sale of units in a Luxembourg fund by the London branch of a French bank to a Panamanian corporation with its principal place of business in Monaco. The fact that the owner of the

corporation — a Canadian citizen — happened to be temporarily in Florida when certain misrepresentations allegedly were made to him was, in the words of the courts below, "entirely fortuitous and personal" (P. App. 17a; *see also id.* at 28a) and "pure happenstance" (P. App. 43a).

Certiorari is inappropriate if a question is "of importance merely to the litigants and [does] not present an issue of immediate public significance." *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 n.2 (1955).[6] It is unlikely that courts will be called upon with any frequency in the future to decide whether statements made to "a transient foreign national in the United States" (P. App. 23a; *see also id.* at 20a n.12) give rise to subject matter jurisdiction under the federal securities laws. Indeed, this is the first such case to be reported since the securities laws were enacted in 1933.

II.

THE ALLEGED DIVISION AMONG THE CIRCUITS ON SUBJECT MATTER JURISDICTION IN SECURITIES FRAUD CASES DOES NOT WARRANT REVIEW

A. The Difference Among the Circuits Regarding the Conduct Test Is Narrow and the Circuits' Standards Are Converging

For nearly 30 years, federal courts have used two tests to determine whether subject matter jurisdiction exists over federal

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6. *Accord Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (certiorari should be granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); Robert L. Stern *et al.*, *Supreme Court Practice* 169, 170-71 (7th ed. 1993) (certiorari sometimes denied even if circuit split exists "where the impact of the conflict is narrowly confined and not apt to have continuing future consequences").

securities claims arising from international transactions: the "effects" and "conduct" tests. Both tests originated in the Second Circuit. *See* James J. Finnerty III, *The "Mother Court" and the Foreign Plaintiff: Does Rule 10b-5 Reach Far Enough?*, 61 Fordham L. Rev. S287, S289 (1993) ("The Second Circuit has been the pioneer in establishing the parameters of the federal courts' subject matter jurisdiction over transnational securities fraud."); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 205-06 (2d Cir.) (effects test), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 992-93 (2d Cir.) (conduct test), *cert. denied*, 423 U.S. 1018 (1975). More recently, the Second Circuit has held that the two tests can be combined, *see Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996), liberalizing the standard used for determining whether jurisdiction exists.[7]

Not surprisingly, the Second Circuit — "the 'Mother Court' of securities law"[8] — has produced a steady stream of decisions

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7. *Accord* Mark B. Schwartz, *Itoba, Ltd. v. Lep Group PLC: An Apple That Fell from the Wrong Branch*, 22 Brook. J. Int'l L. 467, 469 (1996) (*Itoba* "expands the subject matter jurisdiction of U.S. courts over foreign securities transactions and increases the extraterritorial application of U.S. securities laws"); Joseph P. Garland & Brian P. Murray, *Subject Matter Jurisdiction Under the Federal Securities Laws: The State of Affairs After Itoba*, 20 Md. J. Int'l L. & Trade 235, 256 (1996) (*Itoba* evidences "more flexible" approach where subject matter jurisdiction may be found even "where the facts do not support one or the other of the [conduct or effects] tests"); Michael W. Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 Fla. J. Int'l L. 487, 532 (1996) (less than sufficient conduct and less than sufficient effects may still "add up to jurisdiction" under *Itoba*); Dennis R. Dumas, *United States Antifraud Jurisdiction Over Transnational Securities Transactions: Merger of the Conduct and Effects Tests*, 16 U. Pa. J. Int'l Bus. L. 721, 722 (1995) (similar).

8. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting); *accord Zoelsch v. Arthur Andersen & Co.*, 824

(Cont'd)

interpreting the conduct and effects tests. *See, e.g.*, Finnerty, *supra*, at S289 n.15 & S290 n.16 (listing cases). In contrast, the circuits that Petitioner claims conflict with the Second Circuit — the Third, Eighth, and Ninth Circuits — have produced only sporadic decisions on the extraterritorial application of the securities laws. Indeed, the Third Circuit has not dealt with this issue since *Kasser*, more than twenty years ago. The Eighth Circuit's decision in *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979), is almost as old. No court of appeals or district court case within the Eighth Circuit has followed *Continental Grain* in determining the extraterritorial application of federal securities laws.

Rather than being an actual conflict among the circuits, then, the perceived division in the law may simply reflect a lack of opportunity for courts outside the Second Circuit to consider later developments in the law, such as the broad combined conduct and effects test laid down by the Second Circuit in *Itoba*. *See generally* Stern, *supra*, at 172 (conflict created by old case provides less reason for grant of certiorari).

Moreover, the circuit split is quite narrow, even as described by Petitioner. All federal courts, along with the Restatement (Third) of the Foreign Relations Law of the United States (1987) (the "Restatement"), have accepted the conduct and effects tests.[9] The federal appellate courts differ at most

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F.2d 27, 32 (D.C. Cir. 1987) (noting "the Second Circuit's preeminence in the field of securities law"); *SEC v. Kasser*, 548 F.2d 109, 115 (3d Cir. 1977) (calling the Second Circuit "a court with especial expertise in matters pertaining to securities").

9. The Restatement's "reasonableness" inquiry, which was followed by the court below (P. App. 23a-24a), has been cited favorably by Justice Scalia. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818-19 (1993) (dissent).

only over what quantum of conduct is required to satisfy the conduct test, or how closely that conduct must be related to the alleged fraud or injury. Neither the effects test nor the combined *Itoba* test was implicated in the cases that Petitioner cites as evidence of a supposed circuit split.[10] With respect to the conduct test, the position of the Third, Eighth, and Ninth Circuits does not differ radically from that of the Second, Fifth, Seventh, and D.C. Circuits, and any difference between the jurisdictional standards adopted by the Second and Ninth Circuits appears to be decreasing, as shown below:

Third Circuit. Although the Third Circuit stated in 1977 that the federal securities laws "grant jurisdiction in transnational securities cases where *at least some activity designed to further a fraudulent scheme* occurs within this country," *Kasser*, 548 F.2d at 114, it also took the Second Circuit's standards into account. The Third Circuit discussed *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) and *Bersch*

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10. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998) ("This case . . . affords us no occasion to explore [the effects] approach."); *Robinson v. TCI/US West Cable Communications, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) ("As Robinson does not argue that jurisdiction is predicated on adverse effects, . . . we need concern ourselves only with the conduct test."); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 421-22 (9th Cir. 1983) ("The question presented . . . is whether the district court has subject matter jurisdiction under the federal securities laws over a transaction in foreign securities between foreign corporations and citizens of foreign states where the only connection between the transaction and the United States is that some of the allegedly fraudulent conduct took place here and that instrumentalities of interstate commerce were used to effect the fraud."); *Continental Grain*, 592 F.2d at 417 (devoting little more than a paragraph to the effects test and finding that it was not met); *Kasser*, 548 F.2d at 112 ("it is questionable whether any effect in the United States was wrought by the alleged fraudulent activities of the defendant. The SEC really does not claim that there was any such effect.").

as the "leading opinions" on jurisdiction in international securities fraud cases. Quoting *IIT*, the Third Circuit noted that "the conduct of the defendants here *cannot be deemed to be* '*mere[ly] preparatory*' to fraudulent acts committed outside this country." *Kasser*, 548 F.2d at 115. Quoting *Bersch*, the Third Circuit observed that the defendants' acts within the United States "directly cause[d]" the plaintiff's losses. *Id.*

On the facts of *Kasser*, the Second Circuit could well have reached the same result as the Third Circuit.[11] For example, the defendants — including Kasser, a U.S. citizen — allegedly made misrepresentations that induced the plaintiff to invest $45 million over several years in two corporations (one of which was formed under U.S. laws) having offices in United States. 548 F.2d at 111; *see SEC v. Kasser*, 391 F. Supp. 1167, 1169 (D. N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir. 1977). Bank accounts in the United States were used to effectuate the fraud. 548 F.2d at 111. One of the investment contracts at issue was executed in the United States, and documents executed elsewhere were drafted in this country. *Id.* The more expansive language employed by the Third Circuit thus was not essential to its ultimate decision.

Eighth Circuit. In *Continental Grain*, decided in 1979, the Eighth Circuit relied upon both *Kasser* and cases from the Second Circuit:

> we examine . . . whether defendants' conduct in the United States was significant with respect to the alleged violation and whether it furthered the fraudulent scheme. The conduct in the United States cannot be "merely preparatory" and must be material, that is, "directly cause the losses."

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11. The Second Circuit has consistently held that U.S. conduct "merely preparatory" to securities fraud abroad will not implicate our antifraud laws. *See* P. App. 22a and cases there cited.

592 F.2d at 420 (quoting *Kasser*, *IIT* and *Bersch*). In a later decision, the Eighth Circuit specifically noted that "*Continental Grain* . . . concluded the acts in the United States must be 'significant' in order to provide a jurisdictional basis." *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1384 (8th Cir. 1993). This is hardly a departure from the Second Circuit standard.[12] Indeed, the *Continental Grain* court stated:

> *Like the Second Circuit*, we are reluctant to conclude that Congress would have intended the securities laws to have a global reach when the domestic conduct is insubstantial or the domestic impact is too generalized or insignificant.

592 F.2d at 421. *Continental Grain* presented U.S. contacts that were more than sufficient to support an assertion of subject matter jurisdiction under any test: the plaintiff was the wholly-owned subsidiary of a U.S. corporation (*id.* at 411), the defendants were U.S. citizens (*id.*), and "the fraudulent scheme of nondisclosure was devised and completed in the United States" (*id.* at 420).

Ninth Circuit. In *Grunenthal*, the Ninth Circuit adopted the approach described in *Continental Grain*. 712 F.2d at 424, 425. The Ninth Circuit was careful to state that its decision was "not inconsistent with the approach taken by the Second Circuit," *id.* at 426, and it quoted Second Circuit cases requiring that the acts within the United States directly cause the plaintiffs' loss, involve more than "mere preparatory activities" in the United States, and include "substantial misrepresentations" in the United States. *Id.*

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12. *See* Gordon, *supra*, at 524 ("This hardly seems a diversion from the Second Circuit's repeated views on what constitutes conduct. It is more an adoption of those views."; noting that *Continental Grain* "essentially follow[s] the conduct test views established in the Second Circuit") (article cited by Petitioner).

A more recent Ninth Circuit decision involving the extraterritorial application of the securities fraud laws, *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996), appears to bring the Ninth Circuit closer to the Second Circuit. *See* Gordon, *supra*, at 493, 532 (article cited by Petitioner). In *Butte Mining*, the Ninth Circuit, "recogniz[ing] that conduct that is 'merely preparatory' to a fraud is not a basis for jurisdiction of the fraud to be vested in a court of the United States," 76 F.3d at 291, affirmed the district court's dismissal of the complaint. The court of appeals noted that the U.S. securities laws

> are not to be invoked unless substantial steps in the perpetuation of the fraud were taken here or the criminal conduct engaged in affected our securities markets or American investors.

Id. Similarly, in the case at bar, the district court found that

> [t]he communications made while Carr was in Florida were only ancillary to the initial fraud in London and therefore can not be said to have directly caused plaintiff's loss. . . . In the instant case, the United States was never used or intended to be used as a base for manufacturing fraudulent securities for export.

P. App. 42a.

As the Ninth Circuit has narrowed its view of subject matter jurisdiction, the Second Circuit's view has become more expansive. The Second Circuit's decision in *Itoba*, which combines the conduct and effects tests, broadens the scope of extraterritorial subject matter jurisdiction by permitting courts to consider every possible U.S. contact, whether those contacts fall under the rubric of "conduct" or "effects." *See generally* Schwartz, *supra*.

In sum, this case does not present "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler*, 261 U.S. at 392-93 (dismissing writ of certiorari as improvidently granted when Supreme Court determined that the circuits "were really in harmony and not in conflict"); *see also Rice*, 349 U.S. at 79 n.2 (petitions for certiorari should not be granted if alleged conflict "turn[s] out to be illusory"); Stern, *supra*, at 167 ("there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized"). The narrow gradations among the circuits' decisions applying the conduct test do not warrant this Court's review.

Even under the standard urged by Petitioner, the conduct here falls far short of that necessary to support subject matter jurisdiction. The transactions at issue involved neither U.S. investors nor U.S. markets. They were executed in Europe, among non-U.S. persons, as part of a course of dealing that originated in London. On these facts, fine-tuning the applicable legal standard would have no practical effect. As this Court stated in dismissing a writ of certiorari as improvidently granted:

> A federal question raised by a petition may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice, 349 U.S. at 74 (citations omitted).

B. The Analysis Conducted Below Was Fact-Specific

When faced with a predominantly foreign securities transaction, federal courts endeavor to

> determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [the predominantly foreign transaction] rather than leave the problem to foreign countries.

Bersch, 519 F.2d at 985; *accord, e.g., Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991); *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 9 (2d Cir. 1979); *Allen v. Lloyd's of London*, 94 F.3d 923, 929 (4th Cir. 1996); *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990); *Zoelsch*, 824 F.2d at 32. The issue of the amount of U.S.-based conduct and/or the relationship between the U.S. conduct and the alleged injury that is necessary to create subject matter jurisdiction thus involves a case-by-case, fact-specific analysis. *See, e.g., Continental Grain*, 592 F.2d at 414 ("A finding of jurisdiction will depend upon the analysis of the particular facts in any given case."). However, the Supreme Court "do[es] not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

C. The Facts Below Would Not Support Subject Matter Jurisdiction Under the Test Used by Any Circuit

However the test for subject matter jurisdiction is articulated, the facts developed below do not meet it. The securities in question were not registered, listed or traded on any U.S. exchange. P. App. 38a. The Fund is a foreign

investment entity with no U.S. business or investors. *Id.* at 38a-39a. EOC is a Panamanian corporation with a principal place of business in Monaco, and suffered no loss in the United States. *Id.* at 39a. As the Second Circuit observed:

> In the past, we have found jurisdiction over a predominantly foreign securities transaction under the conduct test when, in addition to communications with or meetings in the United States, there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress. *All of these factors are absent from EOC's allegations.*

Id. at 24a-25a (footnote omitted).

The facts alleged by EOC, in sum, present the Court with "no U.S. party to protect or punish." *Id.* at 26a. Under those circumstances, the reach of the U.S. securities laws cannot and should not be expanded to include the transaction at issue. *Id.* at 28a (fortuitous presence of EOC's sole shareholder in Florida "did not bring this otherwise entirely foreign transaction within the antifraud provisions of U.S. securities law").

III.

THE REASONS ADVANCED BY PETITIONER FOR GRANTING CERTIORARI ON THE SECURITIES FRAUD ISSUE ARE NOT PERSUASIVE

Petitioner depicts a parade of horribles that supposedly will occur if this Court does not grant certiorari. Pet. 14-15. However, the problems envisioned by Petitioner are makeweight.

First, it is unlikely that forum shopping (Pet. 14) will occur on a grand scale due to the asserted differences in the standards

for subject matter jurisdiction. To date, international securities litigation — including EOC's own complaint — continues to be filed within the Second Circuit, notwithstanding its allegedly stricter jurisdictional standards. Further attempts to forum-shop can be controlled through transfers for the convenience of parties and witnesses pursuant to 28 U.S.C. § 1404(a) (1998).

Second, the court of appeals' decision does not deprive Americans located abroad of the protection of foreign laws. An American in a situation analogous to Petitioner's would not *expect* to be protected by foreign law. If an American traveling abroad purchased U.S. listed securities from a U.S. broker, paid for those securities from an American bank account, and chose U.S. law to govern this transaction, he or she would expect the transaction to be governed by American — not foreign — law. Similarly, foreign nationals "*temporarily* in this country" (Pet. 15) should not expect U.S. law to apply to purchases of foreign securities traded only on foreign markets from foreign sellers, especially if (as here) they have in advance entered into an agreement selecting foreign law and a foreign forum. Cross-P. App. 22a.[13]

IV.

THE SECOND CIRCUIT'S STATEMENTS IN THIS CASE ABOUT SUBJECT MATTER JURISDICTION UNDER THE 1933 ACT DO NOT WARRANT REVIEW

A. The Second Circuit's Statements About Regulation S Were Dicta

Regulation S creates two safe harbor exemptions from registration. *See* 17 C.F.R. § 230.903. Those safe harbors are

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13. The Investment Agreement is governed by English law. Cross-P. App. 22a. Respondents demonstrated below, without dispute, that the Investment Agreement's forum selection clause ("Disputes arising out of this Agreement *shall* be subject to the jurisdiction of the English courts . . . ," *id.*) is, under English law, construed as electing an exclusive forum. *Id.* at 44a-45a.

non-exclusive. As the Second Circuit recognized, "[a] transaction not within either of the safe harbors may still be outside of the United States within the meaning of 17 C.F.R. § 230.901." P. App. 13a; *see also* Securities Act Rel. No. 6863, [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,524 at 80663-64 (Apr. 24, 1990) (hereinafter the "1990 Release") ("[t]he safe harbors are not exclusive and are not intended to create a presumption that any transaction failing to meet their terms is subject to [the registration requirement]").

The Second Circuit found that "the purchases by EOC ordered by Carr were such foreign transactions" — that is, they did not fall within either of the safe harbors, yet still remained outside the subject matter jurisdiction of U.S. courts. *Id.* The Second Circuit then applied the familiar conduct and effects tests in a way similar to that set forth in the Restatement §§ 403, 416(2), without resort to Regulation S. P. App. 13a-17a. Thus, the Second Circuit's comments on Regulation S and its two safe harbors were dicta, and do not warrant Supreme Court review. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.' "); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (similar).

B. The Second Circuit Did Not Lay Down a Rule of General Application

The Second Circuit's holding regarding subject matter jurisdiction under the 1933 Act was narrow: "we hold that *the securities sold to EOC* did not fall under the registration requirements of the 1933 Act, and that we therefore lack subject matter jurisdiction over EOC's § 5 claims." P. App. 17a. The Second Circuit continued:

> Of course, *we do not attempt in ruling on this case to provide a set of definitive rules to govern future*

> *transactions*. Nor do we mean to suggest that standards developed under the anti-fraud provisions [of the federal securities laws] may be incorporated wholesale into the registration context. The exact contours of the conduct and effects test, as applied to registration cases, must remain to be defined on a case-by-case basis.

P. App. 18a. Thus, the Second Circuit did not purport to set forth definitive standards that would govern future transactions. Supreme Court review at this point would be premature, and instead should await the anticipated development of the governing standard by the courts of appeals.

V.

SINCE THIS IS THE ONLY DECISION ON THE ISSUE OF EXTRATERRITORIAL SUBJECT MATTER JURISDICTION OVER REGISTRATION CLAIMS, THE ISSUE IS NOT RIPE FOR REVIEW

The Second Circuit's decision on subject matter jurisdiction over extraterritorial registration claims under the 1933 Act is one of first impression. *See* P. App. 14a ("we work on an essentially blank slate"). Instead of granting review in this case, the Court — in accordance with its usual practice — should allow various lower courts to develop the law in this field. As Justice Stevens noted in a case where the Court denied certiorari:

> [F]urther consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. . . . [I]t is a

> sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

McCray v. New York, 461 U.S. 961, 962-63 (1983); *see also* Stern, *supra*, at 171 (quoting Justice Brennan as saying that "there is . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeal have considered a question" and Justice Stevens as saying that "experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved").

VI.

THE SECOND CIRCUIT'S DECISION ON SUBJECT MATTER JURISDICTION UNDER SECTION 12 OF THE 1933 ACT DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

Contrary to Petitioner's contention (Pet. 16, 17), the Second Circuit's decision on subject matter jurisdiction under the 1933 Act does not conflict with Supreme Court precedent regarding deference to administrative agencies. The rationales that have traditionally supported judicial deference to agencies are inapplicable to the decision below.

A. The SEC Is Not Entitled to Deference on Issues of Judicial Subject Matter Jurisdiction

While courts should defer to the SEC when that agency determines whether someone has qualified for a safe harbor under Regulation S, the agency's expertise does not extend to telling a federal court that it has subject matter jurisdiction over a civil lawsuit against a foreign citizen.

First, the principal rationale for extending deference to a governmental agency's views is that an agency has expertise in a specialized area, such as environmental protection[14] or Medicare regulations,[15] and Congress has entrusted particular statutes in that area to the agency for administration.

That is not true, however, of the limits on subject matter jurisdiction under the federal securities laws. Those limits were constructed by courts, with the express purpose of conserving judicial resources in accordance with Congress' presumed intent. *See, e.g., Itoba*, 54 F.3d at 121 (test is whether Congress would have wished to devote " the precious resources of United States courts" to transnational transaction at issue); *Allen*, 94 F.3d at 929 (similar); *Zoelsch*, 824 F.2d at 32 ("Courts have . . . been concerned to preserve American judicial resources for the adjudication of domestic disputes and the enforcement of domestic law. . . . It is far from clear that these resources would be well spent on all the potential disputes in which domestic conduct makes a relatively small contribution to securities fraud that occurs elsewhere.") (citations omitted); *Bersch*, 519 F.2d at 985.

Second, it is not the function of agencies such as the SEC to determine whether a federal court has jurisdiction over a private civil action. To the contrary, when legislative mandates are unclear, it is the judiciary's function to determine its own subject matter jurisdiction.[16] Of course, the courts'

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14. *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

15. *E.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

16. *See generally United States v. Nixon*, 418 U.S. 683, 704 (1974) ("Notwithstanding the deference each branch much accord the others,

(Cont'd)

determination of judicial jurisdiction does not prevent the SEC from using its resources as it pleases in administrative proceedings.

Third, Regulation S does not purport to be a jurisdictional test. Rather, it creates two "non-exclusive safe harbors" within which the SEC will not require registration. 1990 Release at 80666; *accord id.* at 80663-64. Although an initial determination by the SEC that certain conduct qualifies for a safe harbor exemption would be entitled to deference, courts need not defer to the SEC when a private plaintiff attempts to use this regulation for a purpose for which it was not intended. *Cf. New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988) ("Judicial deference is required under *Chevron* when Congress has not spoken clearly to *the precise question the agency must consider in the course of its administration of that statute*.").

(Cont'd)
the 'judicial Power of the United States' vested in the federal courts by Article III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . ."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Midland Coal Co. v. Director, Office of Worker's Compensation Programs*, 149 F.3d 558, 561 (7th Cir. 1998) ("We are required to satisfy ourselves of our own jurisdiction. . . . 'While we ordinarily give great weight to the interpretation of the agency charged with enforcement of the statute we are construing, that deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts.' ") (citations omitted).

B. The Interpretation of Regulation S Advanced in the SEC's Amicus Brief Below Conflicts with the SEC's Earlier Expressed Views and Therefore Is Not Entitled to Deference

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.' " *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citations omitted). That is precisely the situation here.

The interpretation of Regulation S advocated in the SEC's *amicus curiae* brief to the Second Circuit conflicts with the agency's previous position on the extraterritorial reach of the 1933 Act, which the SEC articulated in the releases issued as part of its formal rulemaking process. The SEC has "traditionally taken the position that the registration requirements of section 5 of the [1933] Act are primarily intended to protect *American investors*." Registration of Foreign Offerings by Domestic Issuers, Securities Act Release No. 4708 (July 9, 1964), 29 Fed. Reg. 9828, 9828; *see* 1990 Release at 80,665 (the "registration of securities is intended to protect the U.S. capital markets and investors purchasing in the U.S. markets"). Petitioner is not an American investor, but rather is a Panamanian corporation with its principal place of business in Monaco. P. App. 2a, 32a. Even if one were to pierce the corporate veil for Mr. Carr's benefit,[17] the investor would still

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17. In fact, such piercing should not be permitted. *See, e.g., Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) ("While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages."); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) ("we will not here 'pierce

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be a Canadian citizen who happened to be in Florida for "entirely fortuitous and personal" reasons (P. App. 17a; *see also id.* at 28a, 43a). Thus, the Second Circuit's decision is wholly consistent with the SEC's previously articulated policy.

Further, the SEC has recognized that the "registration of offerings with only incidental jurisdictional contacts should not be required," and has instructed that

> principles of comity and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore.

1990 Release at 80664-65. Here, the purchaser was a foreigner, the purchased securities were those of a Luxembourg entity, and they were paid for from a London account. P. App. 2a, 5a, 41a-42a. By arguing that the subject matter jurisdiction of U.S. courts should be expanded to reach this situation, the SEC is adopting a position contrary to its earlier declaration that Regulation S is intended to protect American investors and American capital markets. Therefore, the SEC's amicus brief is not entitled to deference.

(Cont'd)

the corporate veil' in favor of those who created that veil"); P. App. 17a n.8 ("the author of this opinion would add that: 'Having chosen to do business through an offshore corporation to avoid taxes and other regulatory burdens, Carr cannot now claim to be an alter ego of EOC.' ").

VII.

RESOLUTION OF THE QUESTIONS PRESENTED BY PETITIONER WOULD NOT DETERMINE THE CASE

In addition to dismissing the complaint for lack of subject matter jurisdiction, the district court also found that it lacked personal jurisdiction over the Fund, PAM, and Mr. Arida, and that dismissal of the claims were in any event warranted by the doctrine of *forum non conveniens*. P. App. 43a-44a. A district court's decision on *forum non conveniens* is reviewed for abuse of discretion. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . . ."). As is set forth in more detail in Respondents' Conditional Cross-Petition for a Writ of Certiorari, the district court did not abuse its discretion because it reviewed the factors set forth in *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.*, 330 U.S. 501 (1947), and applied the *forum non conveniens* doctrine in a manner that was supported by the evidence. P. App. 43a-52a.

Thus, even if this Court reversed the Second Circuit's decision on subject matter jurisdiction, the Court's decision could well be irrelevant as a practical matter, because Respondents would be entitled to dismissal on other grounds.[18]

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18. The law review article cited by Petitioner advocates the use of the doctrine of *forum non conveniens* to resolve the tensions created by the application of U.S. securities laws to transnational transactions. Finnerty, *supra*, at S291, S316-20. Dismissal on *forum non conveniens* grounds is especially appropriate here because the parties chose English law and an English forum to govern their dealings. Every circuit to consider the issue to date has held that forum selection and choice-of-law clauses are enforceable in cases involving the federal securities laws. (Cont'd)

Furthermore, even if the district court's rulings on personal jurisdiction and *forum non conveniens* were overturned, Respondents would still have the right to move for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(h).

Because dismissal of the complaint based on *forum non conveniens* or other grounds would render this Court's decision on subject matter jurisdiction academic, this is not an appropriate case in which to grant certiorari. *See Rice*, 349 U.S. at 74 ("this Court does not sit to satisfy a scholarly interest in [intellectually interesting] issues"); Stern, *supra*, at 173. Even if the Second Circuit's opinion on subject matter jurisdiction were erroneous, that alone would not warrant review by this Court. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); Stern, *supra*, at 193 (quoting Chief Justice Vinson and Justice Harlan to the effect that the Court will not grant certiorari simply because decision below was wrongly decided).

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See Richards v. Lloyd's of London, 135 F.3d 1289, 1293-94 (9th Cir.), *cert. denied*, 119 S. Ct. 365 (1998); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294-95 (11th Cir. 1998); *Haynsworth v. The Corporation*, 121 F.3d 956, 970 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1513 (1998); *Allen*, 94 F.3d at 929; *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363-65 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

VIII.

THE JUDGMENT BELOW WAS CORRECT

The Second Circuit's decisions on subject matter jurisdiction over EOC's international securities fraud and failure-to-register claims were correct.

First, the Second Circuit's approach to the conduct test is consistent with this Court's precedent in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (unless affirmative intention of Congress is clearly expressed, court presumes legislation is intended to apply only within the territory of the United States), unlike the expansive approach urged by Petitioner. The approach followed by the court below also minimizes the burdens on U.S. courts and the potential conflicts with foreign states.

Second, for transnational failure-to-register claims, it makes sense to adapt the familiar and well-developed conduct and effects standards for subject matter jurisdiction. The approach advocated in the SEC's amicus brief to the Second Circuit — that, absent an exemption, the registration provisions of the 1933 Act apply even to solicitations made by telephone from abroad to transient visitors as they pass through the United States (Pet. 16-17) — would turn the federal courts into fora for disputes concerning every securities transaction that ever touched the United States, without regard to the level of U.S. conduct or effects, and with concomitant potential for conflict with other countries' regulatory systems.

Finally, as a factual matter, the district court and the court of appeals correctly decided that the tangential U.S. contacts in this case did not justify the expenditure of U.S. resources. When so many factors point to Europe rather than the United

States, and when the parties have voluntarily selected a foreign forum and foreign law, federal courts have no cause to exercise subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. PORTIS HICKS
Counsel of Record
FREDERICK A. BRODIE
TAKEMI UENO
WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for Respondents
One Battery Park Plaza
New York, New York 10004-1490
(212) 858-1000